Petition

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ALEXANDER L. STEVAS
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No. 81-710

Supreme Court of the United States

October Term 1981

Audrey C.S. Schlesinger, Petitioner

v.

Lawrence E. Schlesinger, Respondent

On Petition for Writ of Certiorari to the Court of Special Appeals of Maryland and/or Court of Appeals of Maryland

---

PETITION FOR A WRIT OF CERTIORARI

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October 13, 1981

QUESTIONS PRESENTED

1. May a state, by statute or rule or decision, constitutionally deprive separated or divorced spouses of a jury trial or punitive damages for an interspousal tort, solely on the basis of their formerly married status?

2. Where the state has abrogated interspousal tort immunity in part, may it constitutionally prohibit a jury trial or punitive damages to a separated or divorced spouse asserting intentional wrongs to property, by relegating that spouse solely to an equity action, as a matter of due process, or compelling state interest or rational classification?

3. Where the state has extended both a jury trial and punitive damage right to limited cases involving extreme personal interspousal torts or those arising out of the state, may the state rationally prohibit interspousal suits as to property,

jury trials, and punitive damage claims of divorced persons, when the wrongs alleged in each instance involve similar willful conduct, when all other persons except the married and formerly married with causes arising in the state are entitled to jury trials and punitive damages, and when that state deprivation for those determinations is based solely on their status as married or formerly married persons and no more?

LISTING OF PARTIES

The petitioner is Audrey C. S. Krash Schlesinger, c/o 8618 20th Avenue, Adelphi, Maryland 20783. The respondent is Lawrence E. Schlesinger of South Orleans, Massachusetts.

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No._____

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Audrey C.S. Schlesinger, respectfully prays that a writ of certiorari issue to review the judgment and decision of the Court of Special Appeals at issue herein, which has become the decision of the highest Court of the state by virture of denial of certiorari by the Court of Appeals of that state. The grounds and bases of the Petition to such Court or the Court of Appeals hereafter appear.

OPINIONS BELOW

On July 14, 1981 the Court of Appeals of Maryland denied a timely petition that sought review of the Court of Special Appeals decision here at issue (Petition Appendix 1).

That Court of Special Appeals decision was filed on April 7, 1981, known as number 1646 in that Court (Petition Appendix 2-26).*/

The trial court's rulings that dismissed Petitioner's claims and jury demand by granting a demurrer without leave to amend, and its oral ruling based on interspousal tort immunity are in the Appendix. (Petition Appendix 27-34).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

*/ It is a lengthy but unreported decision.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The constitutional provision involved is the Fourteenth Amendment of the Constitution of the United States, and in particular its due process and equal protection provisions duly set forth in the Appendix. (Pet.Apx. 53).

Also involved is the Seventh Amendment granting jury trial rights, set forth in the Appendix (Pet.Apx. 54).

The ruling at issue involves certain Maryland statutes and rules. They essentially deal with when a jury trial may be had. They are: Maryland's Declaration of Rights, Article 23 (formerly Article XV, Sec. 6 of Maryland's State Constitution), and Married Women's Acts, Article 45, Secs. 4 and 5 (Pet.Apx. 55-56).

The latter are discussed and set forth in the Opinion at issue (Pet.Apx. 7-9).

STATEMENT OF THE CASE

On November 28, 1978 (not in 1979 as the Opinion at issue states) Petitioner, Audrey C.S. Schlesinger, filed a suit at law called a Declaration with Exhibit and Demand for Jury Trial in the Circuit Court for Montgomery County, Law No. 50649, against the Respondent/defendant, Lawrence E. Schlesinger (Declaration with attached Jury Demand, Pet.Apx. 36-52).*/

It was on May 18, 1977, some 18 months earlier, that the husband had obtained an a mensa divorce decree in another equity suit in which he counterclaimed for that relief.

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*/ The Exhibit to the Declaration which we have omitted as a matter of detail unnecessary to the issues, set forth more than thirty (30) pages of personal property of Petitioner that the husband Respondent had control of, did not return and was lost, destroyed or concealed, and for which she sought damages.

The husband also filed a separate suit for partition and reimbursement as to the marital home.*/

The Opinion of the Court of Special Appeals to which this Petition is directed generally sets forth the facts essential to the issues here raised.

Therefore, we quote the pertinent parts of that Opinion to summarize those facts and the issues raised. It said this:

> "In the first six counts of the declaration, [Mrs. Schlesinger] sued her husband for torts allegedly committed against her property interest. In these counts, Mrs. Schlesinger alleged that she was the sole owner of certain personal property which was left by her at the family residence on November 30, 1975 while the parties were still married. . . . (Opinion, Pet.Apx. 3).

*/ That case is the subject of a wholly separate issue on a pending Petition recently filed in this Court, Petition No. 81-608.

"Dr. Schlesinger, she alleged in the declaration, had changed the locks on the doors at some unspecified time and was in sole control of the marital residence which prevented her from retrieving her personal property. She further alleged that Dr. Schlesinger despite her repeated demands for the same, converted it to his own use. As a result of Dr. Schlesinger's use of the property and the use of it by other unknown individuals, while under his control, Mrs. Schlesinger claimed that her property was damaged. She requested an accounting as to the personal property, the return of said property, and an award of damages.

"The seventh count of the declaration incorporated by reference the allegations of the first six counts, in addition, alleged that he intentionally and deliberately pursued a course of

conduct directed toward his wife's property, his wife and minor son calculated to cause her to experience emotional distress. (Pet.Apx. 4-5).

"On November 28, 1979, the Circuit Court for Montgomery County sustained Dr. Schlesinger's Demurrer to the Seven-Count Declaration Without Leave To Amend. On December 10, 1979, the Court entered an Order denying the Appellant's 'Motion to Set Aside or Modify Order and Ruling Granting Demurrer Without Leave to Amend and Every Other Relief.' Mrs. Schlesinger has appealed to this Court these rulings by the Circuit Court for Montgomery County." (Pet.Apx. 5-6).

The Court then discussed the issue of interspousal tort immunity at some length, referring to the Married Women's Acts (Pet. Apx. 7-17).

It noted this (Pet.Apx. 9):

"The question presented by this appeal is whether these laws have modified or removed altogether that part of the common law doctrine of interspousal tort immunity which would preclude a suit at law by one spouse against the other for an intentional tort.

"Until July 19, 1978 when the Court of Appeals decided Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978), the common law doctrine of interspousal tort immunity had remained absolutely impervious to repeated and varied attacks.... (citations omitted).

"A number of other jurisdictions have recently chipped away at the doctrine, and the modern trend has been either to limit or to abolish the doctrine altogether. An excellent

and thorough discussion of the trend and many of the reported cases is found in Lusby v. Lusby, supra, pp. 346-351. See also Foster, Modern Status of Interspousal Tort Immunity In Personal Injury and Wrongful Death Cases, 92 A.L.R. 3rd 901 (1979).

"Before the Lusby decision in 1978, the Court of Appeals oft repeated its position that any change in the doctrine in Maryland must come from the Legislature and not the Courts....

"Despite the modern trend, the Lusby decision represents a surprising departure from earlier precedent in Maryland. Lusby is based upon conduct which amounted to an outrageous, intentional tort. The Appellant contends that the clear import of Lusby is to abolish interspousal tort immunity in all cases of intentional torts. The Appellee argues for the narrow view

that the departure from earlier precedent which Lusby represents is best understood when the decision is limited to its own facts. (Pet.Apx. 11).

"The factual allegations (of Lusby) are truly remarkable. The declaration recites that while the wife was operating her motor vehicle on a public highway, her husband pulled along side of her car, and from his pick-up truck, pointed a high-powered rifle at her. Two other men, unknown to her and acting in consort with her husband, cut in front of her car and forced her off the road. She was then ordered out of her vehicle by her husband at rifle point. She claims her husband struck her, tore her clothes off and did forcibly and violently carnally know her against her will and without her consent. He brutally overcame her futile and desperate attempts to prevent this

from happening. The two other men then attempted to rape her with her husband's aid and assistance. Upon releasing her, her husband told her that he would kill her if she informed anyone of this sordid episode. (Pet.Apx. 12).

"If the breadth of the Lusby decision were intended to encompass all cases of intentional torts, surely the Court of Appeals would have said so. The critical language, quite to the contrary, seems clearly and unmistakeably to connote that Lusby must be limited to its own facts. In the opening sentence of the Opinion, the Court said (p. 335):

> "We shall here hold that under the facts and circumstances of this case, amounting to an outrageous, intentional tort, a wife may sue her husband for damages -- a holding which represents somewhat of a departure from the earlier decisions of this Court." (Pet.Apx. 13).

"(T)he Court in Lusby distinguished all of the earlier decisions because

'none of [them] has involved an intentional tort'. If the departure from earlier decisions, however, had been intended to apply indiscriminately in every case involving an intentional tort (as here), there would be no reason for the inclusion in the Court's holding of the phrase 'under the facts and circumstances of this case' and the clear reference to the 'outrageous' conduct. Their inclusion in the actual holding strongly suggests that they are an integral part of that holding.... (Pet.Apx. 14-15).

"Absent a finding of the extraordinary facts and circumstances found in Lusby, a court is bound, under the interspousal tort immunity doctrine, to dismiss a suit at law by a wife against her husband for an intentional tort. When faced with an action at law in replevin (which falls into the

class of an intentional tort against property interests), between a wife living separate and apart from her husband to recover certain of her chattels allegedly held by him and for damages for their wrongful detention, [this] Court (is bound by) Fernandez v. Fernandez, 214 Md. 519, 524, 135 A.2d 698 (1957)....(Pet.Apx. 15).*/

"If the law of Maryland is now to be understood that the doctrine of interspousal tort immunity does not prevent a law suit by a wife against her husband for an intentional tort, that will have to be made manifest by a decision of the Court of Appeals so holding or legislative enactment. Until that would happen, we feel constrained to limit Lusby to its facts and follow the clear teaching of Fernandez v. Fernandez, supra." (Pet. Apx. 17).

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*/ Emphases added.

The Opinion then applied that law to this case with these words (Pet.Apx. 17):

> "The first six counts of the declaration generally allege that the husband had intentionally converted, possessed, wrongfully detained and damaged the personal property of his estranged wife. Each count claims a tort or torts against her property interests. Fernandez v. Fernandez, supra, is controlling. Mrs. Schlesinger cannot sue her husband at law for torts against her property interests. The trial court correctly sustained a demurrer to the first six counts of the declaration." (Pet.Apx. 18)*/

The Court's Opinion then ruled, however, that since the other cases did not resolve the issue, and while she could not proceed at law, she could proceed for these intentional torts in equity by ruling as follows:

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*/ Emphasis added

"Because of the continuing viability of the interspousal tort immunity doctrine --- under the facts and circumstances of this case --- Mrs. Schlesinger could not be entitled under any circumstances to relief at law, even assuming an amended declaration were drafted and allowed to be filed. She could, however, assuming appropriate amendment, be entitled to relief on the equity side, as to her personal property interests only. (emphases added).

"Therefore, we are persuaded that the trial court should have transferred this cause of action to the equity side of the Circuit Court pursuant to Maryland Rule 515.... (Pet.Apx. 21).

"(T)he transfer shall not include any claim for personal tort pertaining to emotional distress. As to that

claim, the Court affirms the lower court." (Pet.Apx. 21,26).

Under Maryland law, as we noted below there are no jury trials in equity, nor are punitive damages allowable in equity. See Petition 32-36, citing 8 Maryland Law Encyclopedia (M.L.E.), Damages, Section 111, p. 84. See also Prucha v. Weiss, 233 Md. 479, 197 Md. 479, 197 A.2d 253, cert.den., 377 U.S. 922 (1964).

This is the law generally in other states.

Beyond relying on the prior law, the Court's Opinion, of course, made no effort to explain why, where the marital relationship has broken down --- as reflected in a divorce or separation --- there is any rational reason to continue the "old rule" for causes arising during marriage. Nor, beyond using the old rule because it exists, why it is either rational or justified to place these formerly married or

separated persons in a special category that deprives them of a jury trial or the damage limitations of "equity" that includes denial of access to punitive damages.

In spite of these important issues and questions presented to it, the Court of Appeals saw fit to deny certiorari review by its ruling of July 14, 1981 (Pet.Apx. 1). This Petition has timely followed.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. The Writ Should Issue To Review The Ruling Of The Court Of Special Appeals To Consider Whether, Although The Seventh Amendment Is Inapplicable To The States And Although Allowable Causes of Action Are Generally Matters Of State Concern, It Is Not Constitutionally Permissible To Deny A Jury Trial Or The Right To Claim Punitive Damages To Divorced Spouses For Interpousal Torts Solely On The Basis Of Their Present Or Former Marital Status, By Relegating Them To A Court Of Equity Rather Than Law, Where Such Rights Are Available To All Others, And The Claimed Wrongs Are Not Based On Marital Status Nor Related To It As Such; Or Where The State Has

Allowed Some Limited Abrogation Of The Interpousal Immunity To Some Spouses For Certain Torts; Or Where By Such Actions, It Has Thereby Eliminated Any Rational Basis For The Classification; Or Where, In Any Event, The Rights Involved Appear Sufficiently Fundamental For the Application Of the Compelling State Interest Test, And Neither It, Nor A Rational Basis Exists For Denying Only to Separated or Divorced Spouses, A Jury Trial Given All Others For The Same Tort Claims, Nor For Denying Them Punitive Damage Claims Granted All Others For The Same Acts Solely Because Of Their Status; And The Writ Should Therefore Issue To Consider These Common Unsettled Issues Of Significant Constitutional Importance Relating To Divorced Or Separated Persons.

Undeniably, but irrelevant to our issues, this Court held long ago that the Seventh Amendment does not apply to the States and thus trial by jury in civil actions is modifiable or alterable, or even may be abolished by the States subject only to their own constitutions. See Walker v. Sauvinet, 92 U.S. 90, 92-93, 23 L.Ed. 678 (1876); Wagner Electric Manufacturing v.

Lyndon, 262 U.S. 226, 233, 43 S.Ct. 589 (1923) and cases cited therein.

So too, quite undeniably but not dispositive of the issues here at all, is the rule stated years ago, that generally a denial of a trial by jury in a state court is not a due process denial under the Fourteenth Amendment. See Hardware Dealers Mutual Fire Insurance Co. of Wisconsin v. Glidden Co., 284 U.S. 151, 158, 52 S.Ct. 69, 71 (1931). See also the Maryland case citing these cases, Bringe v. Collins, 274 Md. 338, 335 A.2d 670 application denied, 421 U.S. 983, 95 S.Ct. 1968 (1975).

The Supreme Court cases to this effect were issued decades before those more recent decisions of this Court which refined what constitutes an equal protection violation when classifications lack reason or a compelling state interest; and further when denial of court access for certain claims is a due process denial; and finally when

actions otherwise allowable become impermissible once they are solely based on status and the status is irrelevant to the claim. See for equal protection, Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 (1970); Graham v. Richardson, 403 U.S. 356, 91 S.Ct. 1848; compare Schweiker v. Wilson, ___ U.S. ___, 101 S.Ct. 1074 (1981). For access to courts as a constitutional right, see Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491 (1977); Gilmore v. Lynch, 319 F.Supp. 105 (N.D.Cal. 1970) affd. 404 U.S. 15, 92 S.Ct. 250 (1971); Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780 (1971). For status classifications see Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102 (1979); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971).

We submit that in the light of these more recent decisions the right to a civil jury trial in a state court and access to courts to present a claim are "fundamental" rights requiring a compelling state interest for their denial.

While it may be true that the Seventh Amendment is not applicable to a state trial per se, still it is applicable in a state when the trial is in the federal court for the same citizen or claim.

A jury right is therefore a "fundamental" right, else it would not exist to a state citizen in a federal court.

Of course Bounds, Boddie and Gilmore all make clear that access to courts to present a claim for adjudication is a fundamental right. They were not at issue in the most recent dicta about the due process aspects of a jury trial noted in Curtis v. Loether, 415 U.S. 189, 192 n.6, 94 S.Ct. 1005, 1007 (1974).

No compelling state interest could ever be shown why divorced or separated persons must have equity trials for what are simply damage or "law" actions, when everyone else without that status, save the married, has access to jury trials and that part of the

court that will award punitive damages for intentional torts.

Here the causes of action for intentional torts --- wilful conversion from wilful destruction or loss, replevin or detinue for intentional deprivation and detention of the former wife's right to her property --- have no relation in themselves to marriage.

Maryland, like many states, but perhaps to a lesser degree, has not only breached the interspousal tort immunity to some degree in Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978) so fully discussed in the Opinion at issue; as we stated in our Petition to its Court of Appeals, page 32, in a decision written after oral argument in this case, it has been ruled that where another state allowed interspousal torts (there negligence), the public policy of the State of Maryland was not so strong as to deny that right at law, and with it, of course,

the jury and damage right. See Linton v. Linton, 46 Md.App. 660, 420 A.2d 1249 (1980).

In view of Maryland's abrogation of the right in Lusby, however limited (and many states have also limited the right as the citations in the Opinion note); and in view of its stated expression in Linton that the public policy of the state was not strong enough to affect spouses who were in Maryland but whose injuries or actions arose elsewhere (and many states do agree but continue the immunity), we submit that relegating the large class of divorced or separated spouses to equity actions where jury trials are denied and the full panoply of damages allowable to others are not permitted, is not only unjustified by any compelling state interest; it is irrational and not permissble even by the "usual" equal protection standards.

Divorce is common today. Separation is common today. Marriage breakdowns are common. Relegating those who are in that

condition to equity courts because the old law said so and not based on the "damage" or "law" nature of their claim does not consider the recent law in this area; it is neither compellingly necessary nor is it rationally related to any reasonable interest. It is a wholly irrational classification that no longer passes muster. We note in this regard that certain recent cases, while not directly on point, appear to express the rationale of what has been noted. See Lecates v. Justice of the Peace Court, 637 F.2d 898; 908-910 (3rd Cir. 1980); O'Conner v. Mowbray, 504 F.Supp. 139 (D.C.Nev. 1980); McClanahan v. American Gilsonite Company, 494 F.Supp. 1334, 1344-1346 (D.C.Colo. 1980).

In the latter of these, the "rights" at issue (use of a law library and a two year statute of limitations) appear far more "rational" and yet were properly struck down. In Lecates the issue was a

surety bond as impeding court access. Lecates does indicate, however, that a jury right is fundamental. Even Bringe v. Collins, supra, recognized that fact as the view in Maryland.

We submit that the opinion at bar is in conflict with these cases, their principles and rationale and yet it reflects a common position deserving of this Court's review.

2. The Writ Should Issue Because The Opinion Below Reflects A Frequent State Ruling That Is In Conflict With The Decisions Of Other Courts And Deserves Proper Resolution In This Court

As the final part of the foregoing section observes, this Opinion reflects long-held, unexamined views of those states who misperceive the repeated dicta about the Seventh Amendment's inapplicability to the states, jury trial rights as "fundamental" rights requiring a compelling state interest for their denial, and finally about the need to find something rational in the

classification beyond the fact that it has been the law. Maryland does not even pretend its denial of interspousal torts is rational. Hence, to relegate the divorced to equity only, to bring normal damage claims against a spouse for intentional wrongs during or after the separation, even compounds its irrationality because it has in fact allowed a few suits at law, providing only the tort is outrageous enough or the cause of action arose elsewhere.

The end result is that it is the litigant's previous marital status, and that only, rather than the nature of the claim as "equitable" or "legal", that has irrationally perpetuated admittedly antiquated law. See Linton supra.

The conflicts between this view and that of other states and jurisdictions reflected in the foregoing cases deserves resolution by this Court.

3. The Writ Should Issue To Settle Whether The Civil Jury Right In State Cases Is A Fundamental Right For Equal Protection Purposes, Once Having Been Granted, Thereby Requiring A Compelling State Interest In Limiting It To Different Classes Of Persons, Particularly Since Those Same State Citizens Filing or Involved In Federal Proceedings Would Have A Fundamental Seventh Amendment Right And The States Generally Provide For the Right In Their Constitutions.

As we have noted the proper status of the state civil jury right in equal protection terms should be to view it as a "fundamental right" involving a compelling state interest, at least for equal protection rather than due process purposes.

Once having granted it to some or most, a state ought to be required to justify its denial to others, with like claims to court access by a compelling interest, for the reasons noted.

States generally do provide for the right in their constitutions as the foregoing cases show. Furthermore, the same

citizens filing in the federal courts, perhaps for the same claims on diversity grounds, would have a "fundamental" right of a civil jury trial under the Seventh Amendment. The place where they file or are involved should not determine what is "fundamental."

CONCLUSION

For the foregoing reasons, the Petition should be granted and the writ issued.

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Counsel of Record for Petitioner

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AUDREY C. S. SCHLESINGER	)	In the
	)	Court of Appeals
	)	of Maryland
	)	
	)	Petition Docket
	)	No. 168
	)	
v.	)	September Term,
	)	1979
	)	
	)	(No. 1646, Septem-
	)	ber Term, 1979
	)	Court of Special
LAWRENCE E. SCHLESINGER	)	Appeals)
	)	
		FILED JULY 14, 1981

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the opposition to petition filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: July 14, 1981

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1646

September Term, 1979

AUDREY C. S. SCHLESINGER

-v-

LAWRENCE E. SCHLESINGER

Morton
MacDaniel
Moylan, Daniel W.
(Specially Assigned)
JJ.

PER CURIAM

Filed: April 7, 1981

This Appeal arises out of a law suit which was filed by Audrey Schlesinger, Appellant, against Lawrence E. Schlesinger, Appellee, during the pendency of divorce litigation between them in the Circuit Court for Montgomery County. Before a final decree was entered in the divorce case, Mrs. Schlesinger, in a separate action at law, filed a seven-count declaration on November 28, 1979 (sic).

In the first six counts of the declaration, she sued her husband for torts allegedly committed against her property interest. In these counts, Mrs. Schlesinger alleged that she was the sole owner of certain personal property which was left by her at the family residence on November 30, 1975, while the parties were still married. She claimed she was forced to leave the marital home. Both parties agreed that the separation began on November 30, 1975, and each of them sought a divorce a mensa et thoro--

the husband claiming as grounds a desertion; the wife, a constructive desertion. In May, 1977, a divorce a mensa was granted to the husband on the grounds of desertion and abandonment. This ripened with the passage of time and the husband was granted a divorce a vinculo matrimonii in August, 1979, on the same grounds. The judgment was affirmed on appeal. Schlesinger v. Schlesinger, No. 1197, Sept. Term, 1979, unreported. This short summary of the divorce proceedings is included here because of an overlap - some of the events and conduct which was relied upon by Mrs. Schlesinger as grounds for an a mensa divorce were also relied upon her in the declaration as the basis for an action at law.

Dr. Schlesinger, she alleged in the declaration, had changed the locks on the doors at some unspecified time and was in sole control of the marital residence which

prevented her from retrieving her personal property. She further alleged that Dr. Schlesinger, by refusing to turn over and restore to her her personal property despite her repeated demands for the same, converted it to his own use. As a result of Dr. Schlesinger's use of the property and the use of it by other unknown individuals, while under his control, Mrs. Schlesinger claimed that her property was damaged. She requested an accounting as to the personal property, the return of said property, and an award of damages.

The seventh count of the declaration incorporated by reference the allegations of the first six counts, in addition, alleged that he intentionally and deliberately pursued a course of conduct directed toward his wife's property, his wife and minor son calculated to cause her to experience emotional distress.

On November 28, 1979, the Circuit Court for Montgomery County sustained Dr.

Schlesinger's Demurrer to the Seven-Count Declaration Without Leave to Amend. On December 10, 1979, the Court entered an Order denying the Appellant's "Motion to Set Aside or Modify Order and Ruling Granting Demurrer Without Leave to Amend and Every Other Relief." Mrs. Schlesinger has appealed to this Court these rulings by the Circuit Court for Montgomery County. She raises two principle contentions:

1. That the lower court was in error in sustaining a demurrer to the Declaration Without Leave to Amend because the doctrine of interspousal tort immunity no longer applies to preclude suits at law for intentional torts between spouses.
2. Even if the lower court correctly sustained the demurrer without leave to amend (because of a finding that under the facts and

and circumstances of this case the doctrine of interspousal tort immunity precludes an action at law between spouses for intentional torts), the Court was required under Rule 515 of the Maryland Rules of Procedure to transfer the cause of action to the equity side.

INTERSPOUSAL TORT IMMUNITY

At common law, a wife did not have legal capacity to sue her husband. Barton v. Barton, 32 Md. 214,224 (1870). She could not sue others in her own name. The legislature in 1898 and 1900 revised the law and removed, in part, this disability. The two laws, though slightly changed by amendment, not relevant here, are in substantially the same form today as when enacted. These laws are now Art. 45, Secs. 5, 20, Md. Code (1980 Repl. Vol. 4B) and provide:

Section 5:

"Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue upon their contracts, and also to sue for the recovery, security or protection of their property, and for torts committed against them, as fully as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract committed by them before or during their marriage, as fully as if they were unmarried; and upon judgments recovered against them, execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence, without his participation or sanction.

The provisions of this section apply to all contractual relations entered into by married or unmarried women, including retail credit accounts or retail installment sales as described, respectively, in Title 12, Subtitles 5 and 6 of the Commercial Law Article of the Code."

Section 20:

"A married woman may contract with her husband and may form a copartnership with her husband or with any other person or persons in the same manner as if she were a feme sole, and upon all contracts, partnership or otherwise,

> a married woman may sue and be sued as fully as if she were a feme sole."

The question presented by this appeal is whether these laws have modified or removed altogether that part of the common law doctrine of interspousal tort immunity which would preclude a suit at law by one spouse against the other for an intentional tort.

Until July 19, 1978, when the Court of Appeals decided Lusby v. Lusby, 283 Md. 334, 390 A. 2d 77 (1978), the common law doctrine of interspousal tort immunity had remained absolutely impervious to repeated and varied attacks. Furstenburg v. Furstenburg, 152 Md. 247, 136 A. 534 (1927); David v. David, 161 Md. 532, 157 A. 755 (1932); Riegger v. Brewing, Co., 178 Md. 518, 16 A. 2d 99 (1940); Gregg v. Gregg, 199 Md. 662, 87 A. 2d 581 (1952); Tobin v. Hoffman, 202 Md. 382, 96 A. 2d, 597 (1953); Fernandez v. Fernandez, 214 Md. 519, 135 A.2d 886 (1957); Ennis v. Donovan, 222 Md. 536, 161

A. 2d 698 (1960); Hudson v. Hudson, 226 Md. 521, 174 A. 2d 339 (1960); Stokes v. Taxi Operators Assn., 248 Md. 690, 237 A. 2d 762 (1968).

A number of other jurisdictions have recently chipped away at the doctrine, and the modern trend has been either to limit or to abolish the doctrine altogether. An excellent and thorough discussion of the trend and many of the reported cases is found in Lusby v. Lusby, supra, pp. 345-351. See also Foster, Modern Status of Interspousal Tort Immunity In Personal Injury and Wrongful Death Cases, 92 A.L.R. 3rd 901 (1979).

Before the Lusby decision in 1978, the Court of Appeals oft repeated its position that any change in the doctrine in Maryland must come from the Legislature and not the Courts. The late Judge Prescott, speaking for the Court in Ennis v. Donovan, 222 Md. 536, 542-543, 161 A. 2d 698 (1960) said:

> "(T)his Court has flatly held that a married woman had no common-law right to sue her husband for injuries suffered by her as the result of his negligence, and, the Legislature has not yet seen fit to grant her such a right. It has also stated that if this disability is to be removed, it must be done by the law-making branch of the government. We can only repeat that if it be desirable to permit a married woman under certain circumstances, to sue her husband in tort, this authorization should emanate from the Legislature, not from the courts."

Despite the modern trend, the Lusby decision represents a surprising departure from earlier precedent in Maryland. Lusby is based upon conduct which amounted to an outrageous, intentional tort. The Appellant contends that the clear import of Lusby is to abolish interspousal tort immunity in all cases of intentional torts. The Appellee argues for the narrow view that the departure from earlier precedent which Lusby represents is best understood when the decision is limited to its own facts.

The factual allegations are truly remarkable. The declaration recites that while the

wife was operating her motor vehicle on a public highway, her husband pulled along side of her car and, from his pick-up truck, pointed a high-powered rifle at her. Two other men, unknown to her and acting in consort with her husband, cut in front of her car and forced her off the road. She was then ordered out of her vehicle by her husband at rifle point. She claims her husband struck her, tore her clothes off and did forcibly and violently carnally know her against her will and without her consent. He brutally overcame her futile and desparate attempts to prevent this from happening. The two other men then attempted to rape her with her husband's aid and assistance. Upon releasing her, her husband told her that he would kill her if she informed anyone of this sordid episode.

If the breadth of the Lusby decision were intended to encompass all cases of intentional torts, surely the Court of

Appeals would have said so. The critical language, quite to the contrary, seems clearly and unmistakeably (sic) to connote that Lusby must be limited to its own facts. In the opening sentence of the opinion, the Court said (p. 335):

> "We shall here hold that under the facts and circumstances of this case, amounting to an outrageous, intentional tort, a wife may sue her husband for damages--a holding which represents somewhat of a departure from the earlier decisions of this Court."

In the concluding paragraphs of the opinion, the Court again said (pp. 357-358):

> "We can conceive of no sound public policy in the latter half of the 20th-century which would prevent one spouse from recovering from another for the outrageous conduct here alleged. There certainly can be no domestic tranquility to be preserved in the face of allegations such as we have before us. It will be recalled that in Gregg, 199 Md. at 667, Chief Justice Marbury said for the Court, 'After discord, suspicion and distrust have entered the home, it is idle to say that one of the parties shall not be allowed to sue the other because of fear of bringing in what is already there.' It will further be recalled that he labeled as 'artificial' the theory that 'the identity of husband and wife persists in its original vigor until

it has been completely dissolved by express legislative mandate. . .' The General Assembly has not heeded the suggestions by this Court that a new statute be enacted. Insofar as the interpretation to be given to the present statute is concerned, we have said many times that the cardinal rule of statutory construction is to ascertain and carry out the real legislative intent, and in ascertaining that intent the court considers the language of an enactment in its natural and ordinary signification. See, e.g., Howell v State, 278 Md. 389, 392, 364 A. 2d 797 (1976), and the cases there cited. For purposes of our decision here today, however, we need not be involved with our prior cases other than for dicta appearing in them to the effect that one spouse may not sue another for tort. None of our prior cases has involved an intentional tort. We find nothing in our prior cases or elsewhere to indicate that under the common law of Maryland a wife was not permitted to recover from her husband in tort when she alleged and proved the type of outrageous, intentional conduct here alleged."

The Court in Lusby distinguished all of the earlier decisions because "none of (them) has involved an intentional tort". If the departure from earlier decisions, however, had been intended to apply indiscriminately in every case involving an intentional tort, there would be no reason

for the inclusion in the Court's holding of the phrase "under the facts and circumstances of this case" and the clear reference to the "outrageous" conduct. Their inclusion in the actual holding strongly suggests that they are an integral part of that holding and not mere surplusage and dicta.

Absent a finding of the extraordinary facts and circumstances found in Lusby, a court is bound, under the interspousal tort immunity doctrine, to dismiss a suit at law by a wife against her husband for an intentional tort. When faced with an action at law in replevin, (which falls into the class of an intentional tort against property interests) between a wife living separate and apart from her husband to recover certain of her chattels allegedly held by him and for damages for their wrongful detention, the Court in Fernandez v. Fernandez, 214 Md. 519, 524, 135 A. 2d 698 (1957) said:

> "We think that the decisions of this Court have established Maryland law

to be that a wife may not sue her husband at law unless a statute specifically authorizes her to do so. It is clear that the Act was construed in the Furstenburg, David and Riegger cases as not giving the wife a right of action she did not possess at common law, and the Gregg case construed the Act of 1900 (giving her the right to sue her husband on a contract with him) as not giving her the right to sue him on any other contract. We must read the Act as our predecessors have read it unless we overrule their decisions. The Act said she could sue for a tort committed against her, and on her contracts. The cases held that this did not mean on a tort committed against her person by her husband or on a contract with her husband, because the Act gave her no additional rights except to sue alone, where formerly she must have sued jointly or in the name of another. The Act says she may sue for the protection or recovery of her property. Reading the Act as our predecessors have said it must be read, we cannot distinguish between a right to sue her husband for a tort against her person and a right to sue him for a tort against her property interests. The literal language of the Act authorizes both the former and the latter, as well as a right to sue him in contract. We think we must put the same limitations on the right to sue for a property tort that the prior decisions have put on the other two rights. It is significant that Prosser, in note 20 on p. 672 of the work cited, lists Maryland as the one exception to the general rule that the Married Women's Acts have been construed to enable the wife to maintain an action for any tort against her property interests."

"Those in the situation of the appellant must proceed in equity until the Legislature sees fit to change the law."

If the law of Maryland is now to be understood that that doctrine of inter-spousal tort immunity does not prevent a law suit by a wife against her husband for an intentional tort, that will have to be made manifest by a decision of the Court of Appeals so holding or legislative enactment. Until that would happen, we feel constrained to limit Lusby to its facts and follow the clear teaching of Fernandez v. Fernandez, supra.

THE INSTANT CASE

The first six counts of the declaration generally allege that the husband had intentionally converted, possessed, wrongfully detained and damaged the personal property of his estranged wife. Each count claims a tort or torts against her property interests. Fernandez v. Fernandez, supra, is controlling. Mrs. Schlesinger can not

sue her husband at law for torts against her property interests. The trial court correctly sustained a demurrer to the first six counts of the declaration.

The seventh count realleges by reference the first six counts and also alleges that Dr. Schlesinger intentionally caused his wife to experience emotional distress by interference with her property interests and also by his alleged assaultive and threatening behavior directed toward her and her son by a previous marriage. The rambling, conclusory, general allegations of assaultive and threatening behavior fall far short of the outrageous conduct alleged in Lusby, and therefore the allegations do not constitute a basis for an action at law by a wife against her husband. Such action we find to be barred by the interspousal tort immunity doctrine. It is interesting to note that the wife relied upon this same alleged misconduct in divorce proceedings as justification for leaving the marital abode.

The chancellor concluded that this conduct did not justify her in leaving and dismissed her bill of complaint by which she sought a divorce a mensa et thoro. This decision was affirmed on appeal. Schlesinger v. Schlesinger, No. 1979 (sic) Sept. Term (1979) (unreported). The trial court correctly sustained a demurrer to the seventh count of the declaration.

The decision of the trial judge to sustain a demurrer to the declaration was correct for yet another reason. Each count violates the rule against duplicity. Maryland Rule 340c. The failure to comply with the mandatory requirements of this rule renders the declaration vulnerable to attack on demurrer, Sommers v. Wilson Bldg. and L. Ass'n. 270 Md. 397, 400, 311 A. 2d 776 (1973).

THE RIGHT TO AMEND

The demurrer in this case was sustained without leave to amend. The law gives wide

discretion to the trial judge in deciding whether or not an amendment is to be allowed after a demurrer has been sustained. The decision is subject to appellate review, but the ruling will not be disturbed on appeal, absent a showing that there has been a clear abuse of that discretion. The question of whether to grant leave to amend a declaration after a demurrer has been sustained is addressed to the sound discretion of the trial judge. Sanford v. Sanford, 15 Md. App. 390, 393, 290 A. 2d 812 (1972); Preissman v. Dir., Enoch Pratt Lib., 263 Md. 32,34-35, 282 A. 2d 1 (1971).

When it is apparent on its face that a declaration is not susceptible to any conceivable form of amendment that could possibly correct the deficiencies (so that a valid cause of action could be stated), there can be no abuse of discretion in the decision denying leave to amend. That would be the case here were it not for Maryland Rule 515, which provides in pertinent part:

> "Where it shall appear that the plaintiff is or may be entitled to some relief or remedy, but not in the particular court, or on the side of the court in which the action is brought or the relief is prayed, the plaintiff shall not on that account be nonsuited or the action dismissed; but the action shall be transferred by an order to such proper court or docket, either of equity or law. . . ."

Because of the continuing viability of the interspousal tort immunity doctrine--under the facts and circumstances of this case--Mrs. Schlesinger could not be entitled under any circumstances to relief at law, even assuming an amended declaration were drafted and allowed to be filed. She could, however, assuming appropriate amendment, be entitled to relief on the equity side, as to her personal property interests only.

Therefore, we are persuaded that the trial court should have transferred this cause of action to the equity side of the Circuit Court pursuant to Maryland Rule 515. In Fernandez v. Fernandez, 214 Md. 519, 524-

525, 135 A. 2d 886 (1957), the trial court sustained a demurrer to the wife's replevin suit against her estranged husband. The case was remanded, without affirming or reversing the judgment, for further proceedings not inconsistent with the opinion in which Judge Hammond (later Chief Judge) stated for the Court:

> "(W)e see no reason why the case should not have been transferred from the law to the equity side of the Circuit Court in which it was brought and appropriate amendments to the pleadings permitted."

What this Court said in Corkran v. Zoning Comm'r., 41 Md. App. 437, 397 A. 2d 262 (1979) about how a trial judge must look upon Rule 515 is instructive (pp. 441-442):

> "The rule permits a trial court to transfer the case to the proper side of the court, if it has been instituted on the incorrect side. The court may take such action on motion by the plaintiff or on its own initiative. The rule places the utmost importance on preventing a plaintiff who appears to be entitled to some relief, from being denied that relief simply because he sought to invoke the aid of the wrong side of the court. The rule

> does not necessitate, as appellee suggests, that a motion for transfer to the proper forum originate with the plaintiff, or that failure by the plaintiff to so move constitutes a waiver of Rule 515. When the judge observes that the plaintiff may be entitled to some relief in the other side of the court from that in which the action was brought, he, in the interest of justice, at any time before the jury retires to consider its verdict, if the action be at law and there is a jury, or at any time before final judgment in an equity or non-jury trial, Md. Rule 515 b, shall order the cause transferred to the proper court or docket. Md. Rule 515a. Thus, if the judge believed the suit to have been brought in the wrong side of the court, he should not have dismissed it but ordered it transferred to the proper side."

If the same case were already pending in identical or substantially identical form in equity proceedings at the time the demurrer in this case was sustained without leave to amend, the interest of justice would not seem to require a Rule 515 transfer. It does not appear that these same issues were considered and fully disposed of on their merits in the divorce proceedings.

Pet.Apx.

The jurisdiction conferred upon a divorce court to determine property rights between husband and wife is not exclusive. As was said in Blumenthal v. Monumental Sec. 271 Md. 298, 303, 316 A.2d 243 (1974):

> "An equity court, sitting as a divorce court, does not sit in exercise of its ordinary chancery jurisdiction, and would be without power to determine ownership of such power by the Legislature, see Gebhard v. Gebhard, 253 Md. 125, 129-130, 252 A. 2d 171, 173 (1969), and cases there cited."

The multiplicity of suits filed by Mrs. Schlesinger at law and equity have tended to cloud, not clarify, her legal and equitable rights. In addition to the divorce proceedings, there was yet another equity suit filed by her which may well overlap and duplicate the factual allegations and relief sought in this action at law. The question was raised by Appellee in Motion Raising Preliminary Objections and the trial court was urged to dismiss the declaration between the same parties

for the same cause as to each and every count of the Plaintiff's Declaration in the Court in Equity No. 54677 . The Motion was denied after hearing on August 23, 1979. If there is a complete or substantial identity of issues, the chancellor will be in a position to dispose of any duplicate proceeding summarily. If, on the other hand, Mrs. Schlesinger has not been afforded the opportunity to reach the merits on the questions raised in the declaration in either of the two equity suits between the same parties, she should be given that opportunity.

Under circumstances, as in this case, where a plaintiff may be entitled to some relief or remedy on the equity side of the Circuit Court, to sustain a demurrer without leave to amend constitutes an abuse of discretion. The chancellor should have in the interests of justice, transferred this case pursuant to Maryland Rule 515 to the

equity court and permitted the Plaintiff to amend the defective pleading, as to those matters pertaining to her personal property interests. The transfer shall not include any claim for personal tort pertaining to emotional distress. As to that claim, the Court affirms the lower court.

> Judgment affirmed in part and reversed in part. Case remanded to be transferred to equity in accordance with this opinion. Costs to be paid by appellee . . .

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

AUDREY C.S. SCHLESINGER :

Plaintiff :

v. : Law No. 50649

LAWRENCE E. SCHLESINGER :

Defendant :

November 28, 1979
Rockville, Maryland

P R O C E E D I N G S

THE COURT: Call the case.

THE CLERK: Law No. 50649, Schlesinger v. Schlesinger.

THE COURT: I think I heard this once before on the Preliminary Objection, and I believe I overruled a Motion for Preliminary Objection as not being the proper motion to attach in the manner that you had.

Mr. Genn, under the laws existing today, why isn't he correct on his Demurrer?

MR. GENN: Well, there are two reasons, but first I would like to state as brought up on the Motion Raising Preliminary Objection in that essentially I think this has been decided by the two decisions of Judge Shearin and Judge Mathias.

Shall I say in the related matters, Judge Mathias, specifically, on an amended counterclaim raising these same matters said that the property matters are appropriate in replevin.

Now, with regard to the existing law, assuming those decisions somehow do not have some binding effect, there is no question, but the case of Lusby was the issue.

THE COURT: Lusby limits itself only to the facts in Lusby. They said that conduct was too gross and wanton that we can't wait for the Legislature to act in this type of situation and it sort of acknowledges what they are going to do with the grey area. We are not going to worry about that until it comes up.

MR. GENN: I do not read it that way. It is interesting to find that in the citation given by Mr. Renehan, he cites Tobin v. Hoffman and David v. David, both of which are discussed in Lusby at some length.

I think if you read the thrust of what Lusby says, as I read the holding, that the law with respect to these matters of suits between husbands and wives will not apply to intentional wrongs. I read it broader.

Your Honor has realized when you read the cases that it cites in its discussion that it is clear to me at the conclusion of it, it points out that none of the prior cases involved is an intentional tort. It is true that there are egregious facts in it.

THE COURT: What could be more egregious for a husband holding a gun to his wife's head?

MR. GENN: I do not have any doubt that is an egregious case.

All right. Here is what they concluded with:

> "The General Assembly has not heeded the suggestions by this Court that a new statute be enacted. Insofar as the interpretation to be given to the present statute is concerned we have said many times that the cardinal rule of statutory construction is to ascertain and carry out the real legislative intent, and in ascertaining that intent the Court considers the language of an enactment in its natural and ordinary significance, and the cases there cited. For purposes of our decision here today, however, we need not be involved with statutory

> construction nor need we be involved with our prior cases other than for dicta appearing in them to the effect that one spouse may not sue another for tort."
>
> I underscore the following sentence:
>
> "None of our prior cases has involved an intentional tort. We find nothing in our prior cases or elsewhere to indicate that under the common law of Maryland a wife was not permitted to recover from her husband in tort when she alleged and proved the type of outrageous, intentional conduct here alleged. Note that under the common law in England as reflected in Blackstone it was under 'the old common law' that a husband 'might give his wife moderate correction' (Emphasis added). The type of action in the case at bar not being forbidden by the common law of this State or any statute of this State, it follows that the trial court erred."

THE COURT: I always thought with reference to the old common law is there a new common law? It is like old annexes and new annexes and a freshly new annex.

MR. GENN: It is obvious that they were struggling with the case in the Court of Appeals, and it may be that the whole business looks like its on its way out, but let's take this specific case. It does

involve intentional tort.

After the second portion, after it says known involved intentional tort, and we are involved with dicta from prior cases, then it said we see nothing in the prior cases that would prevent the outrageous conduct here. Noted, for example, that one count is an intentional infliction of mental stress and alleged outrageous condition.

Those are the allegations of the final count. The allegations of replevin and trover and conversion are willful and malicious.

Now, I assume, if it please the Court, those counts all involve intentional wrongs. Everyone of them involves an intentional wrong.

The only question I really think before Your Honor on this Demurrer is again a matter which would be nice to have a telephone call into the Court of Appeals and ask how far does Lusby go. Does it go beyond its facts?

I read it that it intends to carve out from the old law anything that involves some form of intentional wrong. I suggest, if it please the Court, for that reason in view of the allegations in the case and the import and direction of the Lusby case, what it is trying to say is that this kind of action would lie. It started with a better set of facts in one sense. Certainly, a very serious set of facts, but I do not think it says we are limited to this type of situation.

The Court knew there would be other cases following from the Lusby case. If it wanted to say this is the only instance in which we are going to allow it, it had words available to do so. It would have said this is it until the Legislature acts.

THE COURT: I suggest to you if it wanted to abolish the interspousal immunity, it had the words before to say so, and say we are going to distinguish between tortious

conduct and contractual relationship between the parties.

In any event, Lusby -- this case does not come anywhere close to the Lusby case. It is not infliction of personal injury upon the person that deals with their property and is one that should have been probably taken up before the Chancellor during the Domestic Relation's suit, and accordingly, the Court will sustain the Demurrer without leave, without amendment to each and every count.

MR. GENN: Thank you, Your Honor.

MR. RENEHAN: Thank you.

Whereupon, Proceedings in the above-entitled matter were condluced.)

* * * *

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

AUDREY C.S. SCHLESINGER)
Plaintiff)
v.) Law No. 50649
LAWRENCE E. SCHLESINGER)
Defendant)

O R D E R Filed Dec. 10, 1979

Upon consideration of the Plaintiff's Motion to Set Aside or Modify Order and Ruling Granting Demurrer without Leave to Amend and for Other Relief, it is, by the Circuit Court for Montgomery County, Maryland, this 10th day of December, 1979,

ORDERED, that the Plaintiff's Motion be and hereby is denied, ...

/s/
Judge William M. Cave
Montgomery Co. Circuit Ct.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

Sitting as a Court of Equity

AUDREY C. S. SCHLESINGER)

Plaintiff)

v.) Law No. 50649

LAWRENCE E. SCHLESINGER)

Defendant)

FILED Nov. 28, 1978

DECLARATION

Audrey C. S. Schlesinger, Plaintiff, herein, sues Lawrence E. Schlesinger, Defendant, herein, on account of and for the matters hereafter appearing:

COUNT I

At all times mentioned herein, the Plaintiff was the sole owner of certain personal property which was left at her premises on account of the actions and wrongs of the Defendant, as hereinafter appearing; and she was the significant contributor to the purchase of the premises hereafter

referred to which was titled in the names of the Plaintiff and Defendant.

At all times mentioned herein, the Plaintiff was a separated wife of the Defendant, married to him in 1973, who was intentionally ousted from premises in which she had a property interest and at which substantial quantities of her personal property solely owned by her were held by and subsequently intentionally converted by the Defendant.

On or about November 30, 1975 as a result of intentional wrongs and assaults both earlier and on that date committed against her, the Plaintiff did depart the premises in fear of and to preserve her health, safety and self-respect. The said premises were in this County at 7612 Rosdhu Court, Chevy Chase, Maryland 20015. She was also otherwise justified in leaving.

At all times mentioned, except where otherwise stated, the intentional torts and

wrongs here committed occurred in this state and county. Defendant is subject to "long arm" process.

At all times mentioned herein and to this claim, the Defendant, Lawrence E. Schlesinger, was in sole control of the premises and the property thereon belonging to the Plaintiff, and he did take control thereof, and possession thereof, and he did change the locks of the premises and prevent the Plaintiff to come on the premises to retrieve her personal property or did otherwise refuse to turn over the same at the pertinent times herein; and made subsequent threats and assaults against her.

The personal property of the Plaintiff, herein, Audrey C.S. Schlesinger, which was intentionally, maliciously and willfully converted to the personal use of the Defendant, Lawrence E. Schlesinger, consisted of those items which he intentionally failed and refused, and intentionally continues to refuse to turn over to her or restore to

her in spite of repeated demands for the same.

Those items and the values appear on the attached list marked as Exhibit A whose contents are incorporated herein and made a part hereof.

Their total present value exceeds Two Hundred Ninety-two Thousand Dollars ($292,000.00). They are made up of substantial numbers of rare and in some instances unique items having values which have rapidly increased since their conversion. They include a valuable stamp collection, rare books, objects d'art, specially made furniture, unusual pictures and prints, rare bibliographic and literary material, unusual memorabilia, precious jewelry and semi-precious jewelry, and a series of other items whose history and value are reflected on the attached exhibit. Some of the items converted by or disposed by the Defendant, intentionally

and willfully, were purposefully damaged and destroyed by him or returned in such condition and are reflected on the attached Exhibit A.

WHEREFORE, the premises considered, the Plaintiff prays that for the malicious, willful and intentional conversion, destruction, and damage of her property, she be awarded a judgment against the Defendant in the sum of not less than Two Hundred Ninety-two Thousand Eighty Dollars ($292,080.00) with interest of six percent (6%) from the date of conversion and her attorneys' fees and costs and such other and further relief as the Court sees just.

COUNT II

The Plaintiff incorporates herein all of the allegations of Count I of the Declaration and realleges them as if here and after fully set forth.

Further alleging, many months later, after numerous demands by Plaintiff, Defendant said he would agree to turn over a number of items to Plaintiff, but he did not then or has not now done so except to the extent reflected on the attached Exhibit A or as reflected by such items as Plaintiff received during the course of litigation between the parties, which do not appear on the said document marked Exhibit A.

The Defendant herein unjustly detained all of the said property as aforesaid, and continues to do so as to that property not returned, and has done so intentionally, knowingly and willfully.

The foregoing intentional detention and retention of the Plaintiff's property by the Defendant with no legal right or color of right and his continued refusal has caused the Plaintiff substantial loss and damage, and entitles her to the return of the said items or their value and for

damages for wrongful detention and loss as aforesaid.

WHEREFORE, the premises considered, the Plaintiff prays that this Court enter a Judgment against the Defendant in a sum not less than that stated in Count I, and the return of the foregoing items or their value with damages for their unjust detention, reasonable attorneys' fees, interest from the date of the wrongs and costs.

COUNT III

The Plaintiff incorporates herein all of the provisions of Counts I and II of the Declaration and realleges them as if here and after fully set forth.

Further and additionally, on account of sums received by the Plaintiff from insurance companies insuring losses and thefts, the Defendant did further and additionally intentionally convert sums of cash properly the money of the Plaintiff to his own use, such sums coming to him for reimbursement

for losses of personal property which belonged solely to her; and the Defendant did willfully and falsely endorse her signature to a check therefore and retain the proceeds thereof, intentionally converting the same to his own use in a sum of at least Nine Thousand Dollars ($9,000.00); and such further sums as he may have received in 1976, and he did so sometime after the separation of the parties and his illegal ouster of the Plaintiff. He has intentionally failed to turn over any sums in spite of repeated demands.

Additionally, he assured and represented falsely to Plaintiff that her property was fully insured for fire and theft and casualty loss; she relied upon the same; her property was not insured by him. She suffered further loss on this account reflected on Exhibit A, Page 2a, to at least Thirty-seven Thousand Five Hundred Dollars ($37,500.00); or if he received the same, he did not turn it over.

WHEREFORE, the premises considered, the Plaintiff prays that the Court enter a judgment on this Count against the Defendant for his intentional conversion of such proceeds and other foregoing insurance wrongs, of not less than Forty-six Thousand Five Hundred Dollars ($46,500.00), and such further sums of Plaintiff's as he received, with interest and fees.

COUNT IV

Plaintiff incorporates all of the allegations of the First, Second and Third Counts of the Declaration and realleges them as if fully here and after set forth.

Further averring, Plaintiff asserts that Defendant permitted his children and others to use her personal property without permission and he did fail to obtain reasonable rentals therefore. Further, he did sharply diminish the value of the premises by failing to maintain the same after his willful ouster of her; and he did

intentionally destroy property and fixtures therein, conceal personal property and willfully fail to preserve the property in any reasonable manner; and he did diminish the value of the home and property so that it was not reasonably saleable in order that he might obtain it for himself at a greatly reduced price; and when unsuccessful, his acts were such that when the said premises were ultimately sold, the house and property received at least Eighty Thousand Dollars ($80,000.00) less than should have been received, but for the intentional wrongs of the Defendant in failing to maintain the same with minimal effort, and in willfully damaging the same and presenting the same in a manner which intentionally diminished the reasonable sums that should have been received, one-half of which belonged to the Plaintiff. Further, he did wrongly and intentionally remove furniture. fireplace equipment, "fixtures," other

furniture and specialty items, and retains the same to which she is entitled to one-half or Thirty-seven Thousand Five Hundred Dollars ($37,500.00); and he had the benefit of reduced prices from her professional discount, for which there is an additional Twenty-two Thousand Dollars ($22,000.00) due her.

WHEREFORE, the premises considered, Plaintiff prays judgment on this Count of not less than One Hundred Fourteen Thousand Five Hundred Dollars ($114,500.00) with interest and costs.

COUNT V

Plaintiff incorporates allegations and Facts averred in the foregoing counts as is fully set forth herein.

During the said period, the Defendant permitted and allowed others to use, and take possession of and control of her said personal property as if it were their own, and without her approval and without

authority in law or agreement; and did not obtain the reasonable value therefore and on account thereof the Plaintiff suffered additional damage and loss by virtue of the said unauthorized use of personal property, including car, clothing, and other aforesaid property, and Defendant's failure to obtain or to receive a reasonable value therefor; and further, for diminution of value therein on account of the said unauthorized use and other damages as a consequence of the foregoing.

Further and among other things, the Defendant was at least a bailee by operation of law or otherwise, and thereby responsible and liable for the foregoing whether "authorized" at law or unauthorized in fact.

COUNT VI

Plaintiff incorporates all of the allegations of the First through Fifth Counts of the Declaration and realleges them as if fully here and after set forth.

On the basis of the foregoing, the Plaintiff should be compelled to account for all of the property and her records referred to in the said Counts, or otherwise under his control and possession; and all monies or benefits received by him in connection therewith, and to account for the status and condition thereof and a declaratory judgment rendered thereon; and including those in connection with her business, Ethan Enterprises. The Plaintiff so prays for such declaratory judgment determining the rights of the parties thereto by jury determination or otherwise, and pursuant to the provisions of Sec. 3-401, et. seq. of Courts and Judicial Proceedings, Annotated Code.

COUNT VII

Plaintiff incorporates and realleges as if fully set forth allegations of fact asserted in Counts One through the Sixth.

Further averring, she does assert that the foregoing acts and those effected to

carry them out were part of a process carried out by the Defendant for the purpose of intentionally inflicting on the Plaintiff such mental distress as to cause her to be hospitalized for both mental and physical conditions; and his conduct as hereinbefore and hereafter stated was and is so outrageous as to be beyond all limits permitted or tolerated in our society; it was carried out solely to cause serious permanent mental harm to the Plaintiff with attendant permanent physical loss and aggravation. Among other things beside the foregoing, the Defendant did on both November 3, 1975 and November 30, 1975 beat, strike and threaten the Plaintiff with serious bodily harm; and he did abuse and threaten her son from a previous marriage; and he falsified her signatures, concealed her records; made false charges against her, ousted her from her home; retained her property as aforesaid; caused her hospitalization on

a number of occasions, since the separation. And, knowing of her illness, condition and difficulty, persisted in such continuing acts for the sole purpose of aggravating the same and intentionally inflicting upon her such mental distress with its consequent physical effects, as well as the aforesaid direct physical wrongs, that she might be compelled thereby to give up her legal rights and property. His continued, persistent and culminating acts together constitute such willful, intentional infliction of mental distress as exceeds all permissible bounds. It has resulted in cervical fusion, continuing therapies and other permanent injury.

Plaintiff and Defendant lived together after their marriage in 1973 for less than three (3) years. She has since learned that his prior three marriages and his expertise as a psychologist, he is practiced

in the art of manipulation in such circumstances; and he practiced it upon her; and he so acted for the foregoing reasons.

WHEREFORE, on account of the matters in this Count, Plaintiff prays for a judgment against Defendant in a sum of not less than Two Hundred Twenty-five Thousand Dollars ($225,000.00) or such further sum as may be proper and just.

/s/
Audrey C.S. Schlesinger

/s/
Edward L. Genn
9 North Adams Street
Rockville, Maryland 20850
424-8400
Attorney for Plaintiff

Plaintiff prays a jury trial here and in separate pleading.
Attorney for Plaintiff

[Note: Exhibit A Listing Property At Issue Omitted.]

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

AUDREY C. S. SCHLESINGER	)	
Plaintiff	)	
v.	)	Law No. 50649
LAWRENCE E. SCHLESINGER	)	
Defendant	)	

JURY DEMAND

Plaintiff demands a jury trial on all the issues herein.

/s/
Audrey C. S. Schlesinger

/s/
Edward L. Genn, Esq.
9 North Adams Street
Rockville, Maryland 20850
424-8400 or 638-2027
Attorney for Plaintiff

UNITED STATES CONSTITUTION

(Amendment XIV)

Section 1.
(Citizenship Rights Not To Be Abridged By States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CONSTITUTION

[Amendment VII]

[Trial by Jury in Civil Cases]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

DECLARATION OF RIGHTS, ARTICLE 23

Jury judges of law and fact; right of trial by jury in civil proceedings.

In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.

The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved. (1949, ch. 407, ratified Nov. 7, 1950; 1969, ch. 789, ratified Nov. 3, 1970; 1977, ch. 681, ratified Nov. 7, 1978).

ARTICLE 45 - MARYLAND CODE

Sec. 4. Married women hold property for separate use as through unmarried; same power to convey as husband.

Married women shall hold all their property of every description for their separate use, as fully as if they were

unmarried, and shall have all the power to dispose of by deed, mortgage, lease, will or any other instrument that husbands have to dispose of their property, and no more. (An. Code, 1951, § 4; 1939, § 4; 1939, § 4; 1912, § 4; 1904, § 4; 1898, ch. 457, § 4; 1914, ch. 406.)

Sec. 5. Married women may engage in business, contract, etc.

Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue upon their contracts, and also to sue for the recovery, security or protection of their property, and for torts committed against them, as fully as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract committed by them before or during their marriage, as fully as if they

were unmarried; and upon judgments recovered against them, execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name, and upon her own responsibility, nor for any tort committed, separately by her out of his presence, without his participation or sanction. (An. Code 1951, § 5; 1939, § 5; 1924, § 5; 1912, § 5; 1904, § 5; 1898, ch. 457, § 5.)

CONSTITUTION OF MARYLAND

Constitution of Maryland, Article 46 which provides "Equality of rights not abridged because of sex. Equality of rights under the law shall not be abridged or denied because of sex."

Courts and Judicial Proceedings Article Sec. 3-6A-04. Personal Property.

(a) When granting a limited or absolute divorce, or annulment, the court may

resolve any dispute between the spouses with respect to the ownership of personal property. However, the court may not transfer ownership of personal property from one spouse to the other.

(b) In accordance with the court's determination of the ownership of personal property the court may:

(1) Grant a decree which states that the ownership interest of each spouse is; and

(2) As to any jointly owned property, order a partition or sale in lieu of partition and a division of the proceeds. (1978, ch. 794.)

MARYLAND RULES OF PROCEDURE

Rule 515. Transfer of Action . . .Gen'l.

a. Order of Transfer.

Where it shall appear that the plaintiff is or may be entitled to some relief or remedy, but not in the particular court, or on the side of the court in which the action is brought or the relief is prayed, the plaintiff shall not on that account be nonsuited or the action dismissed; but the action shall be transferred by an order to such proper court or docket, either of equity or law, in the same county, as the nature thereof may require, or, if the action is within the exclusive jurisdiction of the District Court, then to the District Court sitting in the same county and upon such terms as to the payment of costs as the court may order.

(Amended Sept. 15, 1961; June 30, 1973, effective July 1, 1973.) . . . .

b. Time

Such transfer may be made at any time, in an action at law, before the jury retires to consider its verdict, or in an action at law without a jury and in an action in equity before the final judgment is entered.

(Amended Sept. 26, 1957.)

c. Further proceedings - Amendment

If a transfer be ordered pursuant to this Rule, the court in its order shall direct the plaintiff to amend the pleadings within the time provided by said order to conform the action to the course of the court to which the same has been ordered transferred. Thereafter, subsequent pleadings shall be filed to bring the action to issue within such times as are provided by these Rules.

(Art. 75, § 125.)

Opposition

81-710

No.

Office-Supreme Court, U.S.
FILED
NOV 16 1981
ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

October Term 1981

Audrey C.S. Schlesinger, Petitioner

v.

Lawrence E. Schlesinger, Respondent

On Petition for Writ of Certiorari to the Court of Special Appeals of Maryland and/or Court of Appeals of Maryland

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRODSKY, GREENBLATT & RENEHAN,
Chartered

By: _____
Bryan Renehan
Solicitors for Respondent
352 Hungerford Court
Rockville, Maryland 20850
(301) 424-1260

QUESTION PRESENTED

IS IT CONSTITUTIONALLY PERMISSIVE FOR A STATE TO REGULATE THE SOCIAL RELATIONSHIP OF MARRIAGE AND TO REQUIRE THAT THE WIFE MAY NOT SUE HER HUSBAND AT LAW UNLESS A STATUTE AUTHORIZES HER TO DO SO?

TABLE OF AUTHORITIES

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Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102 (1979). 8

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CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment VII. 7

U.S. Constitution, Amendment X. . 7
The power is not delegated to the United States by the Constitution nor prohibited by it to the States, or reserved to the States respectively, or to the people

U.S. Constitution, Amendment XIV. 11

No. _____

Supreme Court of the United States

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On November 28, 1979, the Circuit Court for Montgomery County, Maryland (J. Cave) sustained without leave to amend Respondent's Demurrer to a seven count Declaration filed by Petitioner, Audrey C. S. Schlesinger. Thereafter on December 10, 1979, the Court entered an Order denying the Petitioner's "Motion To Set Aside Or Modify Order and Ruling Granting Demurrer Without Leave To Amend And For Other Relief." She appealed to the Court of Special

Appeals of Maryland which reversed the lower Court in part and affirmed in part, remanding the case to lower Court to be transferred from the law side of the Court to the equity side of the Court for trial before a Chancellor.

The Petitioner then filed a Petition for Writ of Certiorari to the Court of Appeals of Maryland raising for the first time the constitutional issue that she was being deprived of either equal protection or due process of law (exactly which was unclear) as a result of having the case transferred from law to equity. The Court of Appeals of Maryland denied the Petition for Writ of Certiorari on July 14, 1981.

The factual predicate for the instant action was as follows: The parties hereto were married in 1973 and lived together until November 30, 1975, when Mrs. Scheslinger left the marital home which was located in Chevy Chase, Maryland. Mrs. Schlesinger averred that she had left the marital home to preserve her health, safety and self-respect, and that her

departure was the result of Dr. Schlesinger's alleged assault upon her on November 30, 1975. However, in the divorce suit initiated by Mrs. Schlesinger, the Court found that Mrs. Schlesinger was not justified in leaving and granted Dr. Schlesinger a divorce a mensa et thoro in May of 1977. The a mensa decree was later enlarged to a decree a vinculo matrimonii in August of 1979. The grounds for this divorce was the desertion and abandonment of Dr. Schlesinger by Mrs. Schlesinger.

During the pendency of the divorce litigation and prior to the entry of a final decree, Mrs. Schlesinger filed in the instant case a seven count Declaration on November 28, 1978. The first six counts of the Declaration dealt with Dr. Schlesinger's alleged retention, concealment, use, disposal or and damage to Mrs. Schlesinger's personal property which she claimed she had left in the marital home at the time of her departure in 1975. Count seven of the Declaration alleged an intentional infliction of emotional distress perpetrated by

Dr. Schlesinger on Mrs. Schlesinger and her minor son as a result of this same conduct in 1975.

In her Declaration, Mrs. Schlesinger alleged that she was the sole owner of certain personal property which was acquired at some unspecified time and was left by her at the family residence on November 30, 1975, while the parties were still married. She alleged that Dr. Schlesinger had changed the locks on the premises at some unspecified time and was in sole control of the Chevy Chase residence which prevented Mrs. Schlesinger from retrieving her personal property. She further alleged that Dr. Schlesinger refused to turn over or restore to her her personal property despite her repeated demands for the same. As a result of Dr. Schlesinger's use and the use of other unknown individuals of the property, Mrs. Schlesinger claimed that said property was damaged. She requested an accounting as to the personal property, the return of said property and an award of damages.

The personal property claimed by Mrs. Schlesinger was described in a 26-page attachment to the Declaration. The first 4 pages of this attachment contained a general classification of the items Mrs. Schlesinger claimed. The general categories included such items as party supplies, gift wrapping, cleaning supplies, home maintenance, gardening items, food, liquor and cigarettes. The damages claimed by Mrs. Schlesinger as to these items alone were in excess of $8,500.00. A more detailed description of these items is contained in the other attachments to the Declaration. Among the missing party supplies were: plastic cocktail and champagne glasses, paper and plastic plates, cups and bowls, paper napkins and tablecloths, etc. The gift wrappings were allegedly comprised of paper, bows, tags, seals, ornaments, boxes, bags. The cleaning supplies were more fully described as paper towels, detergents, waxes, cleaners, etc. The home maintenance items included drain cleaners, plungers, nuts, bolts, adhesives, glues,

tapes and so forth. There was no detailed accounting as to the food, liquor and cigarette categories.

Count seven alleged that Dr. Schlesinger on November 3, 1975 and November 30, 1975 beat, struck and threatened Mrs. Schlesinger with bodily harm, falsified her signature, concealed her records, made false charges against her, ousted her from her home and retained her property. In addition, she alleged that he abused and threatened her son (by a previous marriage) in some unspecified manner.

During the period of time Mrs. Schlesinger alleged these events occurred, she and Dr. Schlesinger were married.

ARGUMENT

THERE IS NOTHING CONSTITUTIONALLY PERMISSIVE ABOUT A STATE REGULATING THE SOCIAL RELATIONSHIP OF MARRIAGE AND REQUIRING THAT THE WIFE MAY NOT SUE HER HUSBAND AT LAW UNLESS A STATUTE SPECIFICALLY AUTHORIZES HER TO DO SO.

The law in this area has been clearly defined by this Court in the past. Marriage has traditionally been subject to State regulation without Federal intervention and consequently the regulation of marriage should be left to the exclusive State control by the Tenth Amendment. Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817 (1967). Even the Petitioner concedes that the Seventh Amendment does not apply to the States. Hardware Dealers' Mutual Fire Insurance Co. v. Glidden Company, 284 U.S. 151, 52 S.Ct. 69 (1931) and Bringe v. Collins, 274 Md. 338, 335 A.2d 670, Application for Cert denied, 421 U.S. 983, 95 S.Ct. 1968 (1975).

In attempting to reverse the above authority, the Petitioner is apparently claiming

that marriage is now some kind of suspect classification. In an attempt to support this argument, she cites the cases of Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102 (1979) and Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971). This Court found in these two cases that the State's distinctions in their statutes in their respective cases which were based on sex where not reasonably related to the object of the legislation and therefore declared them to be unconstitutional. Nowhere in either of these cases does it mention that marriage is a suspect classification. In addition, the weakness of the Petitioner's argument that the right to a jury trial in the instant action as opposed to trying the case before a Chancellor in equity is a "fundamental" right is underscored by the lack of authority cited for this proposition.

One fact that the Petitioner has obscured in her Petition is that the Court below did not deny her the right as a "former spouse" to sue her former husband for an intentional tort. What the doctorine of intraspousal tort

immunity in Maryland holds is that a cause of action based on an intentional act cannot accrue during the marriage. The facts alleged by the Petitioner all allegedly occurred during the time that the parties were married. The Court of Special Appeals of Maryland did not say that a former spouse could not sue for facts that arose after the time of the divorce. The public policy of Maryland in support of this doctrine was clearly set forth in the case of David v. David, 161 Md. 532, 157 A. 755 (1932) where the Court therein quoted from the case of Abbott v. Abbott, 67 Me. 304 as follows:

> There is not only no civil remedy, but there is no civil right, during coverture, to be redressed at any time. There is, therefore, nothing to be suspended. Divorce cannot make that a cause of action which was not a cause of action before divorce. The legal character of an act of violence by husband upon wife, and of the consequences that flow from it, is fixed by the condition of the parties at the time the act is done. If there be no cause of action at the time, there never can be any.***So to speak, marriage acts as a perpetually operating discharge of all wrongs

between man and wife, committed by one upon the other. As said by Settle, J., in State v. Oliver, 70 N.C. 60, "it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive." We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically, the married woman has remedy enough. The criminal courts are open to her. She has the privilege of the writ of habeas corpus, if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce. If a divorce is decreed to her, she has dower in all his estate, and all her needs and all her causes of complaint, including any cruelties suffered, can be considered by the court, and compensation in the nature of alimony allowed for them. In this way, all matters would be settled in one suit as a finality. It would be a poor policy for the law to grant the remedy asked for in this case. If such a cause of action exists, others do. If the wife can sue the husband, he can sue her. If an assault was actionable, then would slander and libel and other torts be. Instead of settling, a divorce would very much unsettle all matters between married parties. The private matters of the whole period of married existence might be exposed by suits. The statute of limitations could not cut off actions, because during coverture the statute would not run. With divorces as common as they are now-a-days, there would be new harvests of litigation. If such a precedent was permitted, we do not see why any wife surviving the husband could not maintain a suit against his executors or administrators for defamation, or cruelty, or assault, or deprivations that she may have wrongfully suffered at the hands of the husband; and this would add a

> new method by which estates could be plundered. We believe the rule, which forbids all such opportunities for law suits and speculations, to be wise and salutary and to stand on the solid foundations of the law. 161 Md. at 539-540, 157 A. at 757-758.

It is clear that the regulation of the marital relationship by the State of Maryland through its common law is not violative of either the due process or equal protection clause of the Fourteenth Amendment.

CONCLUSION

Since there is no violation of the Petitioner's constitutional right under the Fourteenth Amendment to the United States Constitution, this Court should deny her Petition For Writ Of Certiorari.

BRODSKY, GREENBLATT & RENEHAN,
Chartered

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